85-658

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court Of The United States

October Term, 1985

IN RE GRAND JURY PROCEEDINGS.

DAVID MORGANSTERN AND
FRED MORGANSTERN ..... Petitioners

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States may be asserted by an individual in response to a subpoena seeking to compel the production of corporate and partnership documents.

PARTIES

United States of America and those named in caption.

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CONSTITUTIONAL PROVISION:

U. S. Constitution, Amendment V 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (No. 84-5235), whose judgment is herein sought to be reviewed, was decided and filed on August 23, 1985. Said opinion has been recommended for full-text publication, but as of this time is yet to be published. A copy of the opinion is reprinted in the appendix hereto, *infra*, pages 1a-16a. The bench order of the United States District Court for the Eastern District of Kentucky is unreported but appears at page 18 of the transcript of the hearing. A copy of the bench order is reprinted in the appendix hereto, *infra*, pages 17a-19a.

STATEMENT OF JURISDICTION

The Petitioner invokes the jurisdiction of this Court in this Petition from the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, decided and filed August 23, 1985, pursuant to 28 U. S. C. Secs. 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On January 1, 1984, the attorney for David Morganstern and Fred Morganstern, was served with a grand jury subpoena commanding production of certain Morganstern personal records as well as certain business documents of coal mining partnerships or financial organizations controlled or owned by the Morgansterns. A Motion to Quash was filed by their attorney. Upon its denial, the attorney was granted sixty (60) days in which to produce the records or file additional objections to the production. Prior to the expiration of the sixty (60) day period, the Supreme Court ruled in *United States* v. *Doe*, 465 U. S. 605, 104 S. Ct. 1237 (1984), that the act of producing subpoenaed documents to a Federal grand jury is testimonial, and therefore privileged, and cannot be compelled without a statutory grant of use immunity. In light of the *Doe* decision, another Motion to Quash was filed upon the grounds that compliance with the

subpoena would cause David Morgenstern and Fred Morganstern to be witnesses against themselves in violation of the rights guaranteed to them by the Fifth Amendment. This Motion was denied from the bench.

On November 14, 1984, the United States Court of Appeals for the Sixth Circuit concluded that the compelled production of partnership and corporate records would require certain tacit admissions that could be incriminatory and in violation of the Fifth Amendment rights of the Morgansterns. The matter was remanded to the District Court with instructions to quash the subpoena. *In Re: Grand Jury Proceedings*, 747 F.2d 1099 (6th Cir. 1984). However, a Petition for Rehearing *en banc* was sustained, vacating the November 14, 1984 decision. The Court of Appeals for the Sixth Circuit then affirmed *en banc* the judgment of the District Court concluding that an individual cannot rely upon the Fifth Amendment privilege to avoid production of partnership and corporate records in his possession as a representative of the collective entity.

JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the District Court is based on the general supervisory power which the District Court exercises over the Grand Jury, specifically Rules 6 and 17 of the Federal Rules of Criminal Procedure.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decisions of other Courts of Appeals regarding the application of the privilege against self-incrimination to the act of compelled production of documents recognized in *United States* v. *Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984).

In *United States* v. *Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), this Court recognized that a government subpoena compels the holder to perform an act that may convey incriminating testimonial information. After noting that the District Court found the testimonial admissions from production in the case *sub judice* to be incriminatory, this Court held the act of production was privileged and could not be compelled without a statutory grant of use immunity. 465 U.S. at page 606. The subpoena in *Doe* sought the production of sole proprietorship records.

In this case the Sixth Circuit, following an *en banc* rehearing, held that the privilege as applied to compelled production enunciated in *Doe* had no application to one who is asked to produce the records of a collective entity. The Sixth Circuit's refusal to apply the privilege to compelled production of corporate or partnership records is rooted in the assumption that *Doe* is not intended to apply to collective entity documents since it involved the records of a sole proprietorship. The Sixth Circuit reasoned that an expanded application of *Doe* would presume this Court

intended to nullify, *sub silento*, the collective entity distinction originally recognized in *Hale* v. *Henkel*, 201 U.S. 43 (1906).

Other United States Courts of Appeals have, however, concluded that the *Doe* privilege applies to collective entity documents if the testimonial aspects of production are shown to be potentially incriminatory. The Third Circuit, in *In Re Grand Jury Matter*, 768 F.2d 525 (3d Cir. 1985), considered the narrow application of *Doe* adopted by the Sixth Circuit and concluded that *Doe*, as well as *Fisher* v. *United States*, 425 U.S. 391 (1976), made clear that the nature of the document, or of the entity that created or owned the document, is not significant. The pivotal factor is the likely incriminatory communicative aspects of its production. The notion that *Doe* cannot be applied to corporate documents without an abandonment of the collective entity rule was also considered by the Third Circuit. With confidence equal to that expressed by the Sixth Circuit in reaching an opposite conclusion, the Third Circuit wrote that the application of *Doe* to production of collective entity documents does not diminish the vitality of *Hale* or its progeny. The Third Circuit simply concluded that the collective entity rule goes no further than to deny the assertion of the Fifth Amendment privilege to the incriminatory *content* of documents. According to the Third Circuit, the collec-

tive entity rule cannot be logically or properly applied to the testimonial aspects of the act of production.[1]

While the Sixth and Third Circuits are in clear and direct conflict as to what *Doe* has to say about the Fifth Amendment privilege pertaining to the communicative aspects of the production of collective entity documents, other Circuits are far more tentative. The Fifth Circuit, in its opinion in *In Re Grand Jury Subpoena-Lincoln*, 767 F.2d 1131 (5th Cir. 1985), wrote that *Doe* applies to sole proprietorship records and not to the records of a collective entity. In nearly the same stroke of the pen, however, the Fifth Circuit noted that if the Government's subpoena of corporate records compelled the custodian of the records to impliedly admit control of the corporation, such a disclosure could be incriminating and hence protected.[2] The Fifth Circuit recognized that at least one of the potentially incriminatory testimonial

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[1]Judge Jones wrote in his dissent in this case that *Doe* represents a new application of the privilege to an event that the law did not recognize as potentially testimonial at the time the rule evolved. Judge Jones believes, as does the Third Circuit, that *Doe* and the collective entity rule govern separate and distinct questions of law.

[2]The handwritten language added to the Lincoln subpoena considered by the Fifth Circuit is almost identical to the wording of the subpoena in this case. The Fifth Circuit made clear their opinion did not apply to this handwritten addition because identification of an entity as one Lincoln controlled would "tend to incriminate him or furnish a link in the chain of evidence . . ." 767 F.2d at page 1132.

aspects of compelled production of collective entity documents is whether the subpoenaed individual has control over the collective entity whose documents he possesses.[3]

Similarly, the Second Circuit in *In Re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985), held that *Doe* is limited to the records of sole proprietorships. Before reaching their conclusion, the Court recognized that an individual, in some circumstances, may have Fifth Amendment privileges against being personally compelled to produce corporate documents.[4]

---

[3]The potentially incrimin tory admission of control of a business organization was noted by Judge Jones in his dissent in the opinion below. As the Morgansterns have argued throughout these proceedings, their possession of corporate and partnership documents would support an inference that they controlled the enterprises in question, which could be incriminating during grand jury proceedings investigating possible violations of the Racketeer Influence and Corrupt Organizations Act, 18 USC Sec. 1961 *et seq.*

[4]The facts in the Second Circuit decision are distinguishable from the facts below. In the Second Circuit action there was no question that a corporation, and not individuals, had been subpoenaed. In addition, the District Court directed that the records be produced by a person who was not a target of the grand jury investigation. The Morgansterns have argued throughout the proceedings that they were subpoenaed in their individual capacity and the grand jury's investigations are focused on them individually, not upon the corporations or partnerships in which they may have had an interest.

An irreconcilable and significant conflict exists between the Third and Sixth Circuits as to the meaning of *Doe*. The Second and the Fifth Circuits are unwilling to either limit *Doe* to proprietorship records or to expand it to collective entity documents. The importance of quickly resolving the conflict cannot be overstated. Until the issue is decided by this Court, the right of citizens to employ the shield of the Fifth Amendment will depend upon where they live. Grand jury investigations and resulting prosecutions throughout the country may be compromised or tainted unless the procedures for the production of documentary evidence and the concomitant rights of the individuals from whom production is sought are clarified. The conflicting decisions and the need to clarify the scope of *Doe* justify granting a writ of certiorari to review the judgment below.

CONCLUSION

The decision of the Sixth Circuit permits the Government to compel the production of partnership and corporate documents from an individual as a representative of the collective entity and, as a result, forces the individual to incriminate himself through the testimonial act of producing the documents. The individual is clearly compelled to furnish a link in the chain of evidence needed to connect the individual with the collective entity. The Sixth Circuit's decision below is a serious encroachment on an individual's rights guaranteed by the Fifth Amendment to the Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX

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Opinion of the United States Court of Appeals for the Sixth Circuit 1a-16a

Order of the District Court in *In re: Jury Proceedings Before Grand Jury*, 80-CF-1-LN (11-FM-0000), denying motion to quash 17a-19a

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS.

DAVID MORGANSTERN and FRED MORGANSTERN, *Appellants.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed August 23, 1985

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, WELLFORD and MILBURN, Circuit Judges.

LIVELY, C.J., delivered the opinion of the Court in which ENGEL, KEITH, MERRITT, KENNEDY, CONTIE, KRUPANSKY, WELLFORD and MILBURN, JJ., joined. JONES, J., (pp. 10-12) delivered a separate dissenting opinion, in which MARTIN, J., joined.

LIVELY, Chief Judge. The question in this case is whether a subpoena duces tecum requiring the production of partnership and corporate records should be quashed on the ground that production of the documents will violate the appellants' Fifth Amendment privilege against compulsory self-incrimination. The district court denied the motion to quash and a panel of this court reversed, concluding that the appellants could not be required to produce the records in the absence of a grant of use immunity. *In re Grand Jury Proceedings (Morganstern)*, 747 F.2d 1098 (6th Cir. 1984). A majority of the judges in active service voted to rehear the case *en banc*, thus vacating the panel opinion and the previous judgment of the court. Rule 14, Rules of the Sixth Circuit. Following supplemental briefing the case was argued before the full court. We now affirm the judgment of the district court.

I.

As the panel opinion makes clear, the subpoena ordered the production of partnership and corporate records only; no personal records of the Morgansterns are involved. Also, though an earlier motion to quash relied on three grounds, this appeal is from the denial of a motion based solely on the contention that compelled production of the records would violate the appellants' Fifth Amendment right against self-incrimination. 747 F.2d at 1099. Thus, our inquiry is a narrow one.

A.

In *Bellis* v. *United States*, 417 U.S. 85, 88 (1974), the Supreme Court noted that it had been established by a long line of cases "that an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." The petitioner in *Bellis* was a member of a three-partner law firm who argued that the small size of the partnership made it unrealistic to consider the firm as an entity independent of the three partners.

Speaking through Justice Marshall the Court rejected this argument, concluding that the law firm had an "established institutional identity independent of its individual partners," *id.* at 95; and that the petitioner held the subpoenaed records in a representative capacity. *Id.* at 97. Referring to its earlier decision in *United States* v. *White*, 322 U.S. 694 (1944), the *Bellis* Court stated the rationale for the "collective entity" rule:

> Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege. In view of the inescapable fact that an artificial entity can only

> act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organization.

Id.

B.

The Supreme Court reexamined the basis of many of its earlier decisions applying the Fifth Amendment privilege against compelled testimony to the production of documents in *Fisher* v. *United States*, 425 U.S. 391 (1976), though a shift in the emphasis of inquiry was foreshadowed by *Couch* v. *United States*, 409 U.S. 322 (1973). In *Fisher* the Court held that insofar as the Fifth Amendment applies to non-oral evidence, it protects against the compelled production of documents if the act of production is "testimonial." 425 U.S. at 408. The Court was concerned with the "communicative aspects" of the act of producing evidence in response to a subpoena, "wholly aside from the contents of the papers produced." *Id.* at 409-10. Despite this shift in emphasis from the contents of subpoenaed documents to the testimonial act of production, the Court did not retreat from the col-

lective entity rule. Rather, the Court repeated the holding of *Bellis* that "neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds." *Id.* at 408. In addition the Court referred twice to *White, Bellis* and related cases in rejecting arguments of the taxpayer.

> This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. *E. g., Wilson* v. *United States,* 221 U.S. 361 (1911); *Dreier* v. *United States,* 221 U.S. 394 (1911); *United States* v. *White,* 322 U.S. 694 (1944); *Bellis* v. *United States,* 417 U.S. 85 (1974); *In re Harris, supra.*

425 U.S. at 411-12.

> Moreover, in *Wilson* v. *United States, supra; Dreier* v. *United States, supra; United States* v. *White, supra; Bellis* v. *United States, supra;* and *In re Harris, supra,* the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the

> documents produced are those demanded by the subpoena," *Curcio* v. *United States,* 354 U.S., at 125.

Id. at 413 (footnote omitted).

C.

This court has had several opportunities to apply the *Fisher* approach of examining circumstances related to the act of production where IRS summonses and grand jury subpoenas have been resisted on Fifth Amendment grounds. In *United States* v. *Schlansky,* 709 F.2d 1079 (6th Cir. 1983), *cert. denied,* _____ *U.S.* _____, 104 S. Ct. 1591 (1984), after discussing the shift in emphasis by the Supreme Court from consideration of the contents of documents to consideration of the circumstances related to the act of production, this court wrote:

> Under this focus the key question is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials; Does it supply assurance of authenticity not available to the government from sources other than the person summonsed? Though the party seeking to avoid

> compliance does not have to show more than is required to demonstate that the privilege is properly claimed, he must make some showing that the act of production alone would involve an incriminating testimonial communication.

Id. at 1084 (citation omitted).

Schlansky, concerned individual tax records. However, *In re Grand Jury Empanelled March 8, 1983,* 722 F.2d at 294 (6th Cir. 1983), *cert. dismissed sub nom. Butcher* v. *United States,* _____ U.S. _____, 104 S.Ct. 1458 (1984), dealt with the precise issue now before the court. There a panel of this court concluded that the collective entity rule was not affected by *Fisher,* and that *Fisher* "did not extend Fifth Amendment protection to the production of the records of a corporation or other collective entity." 722 F.2d at 296. The distinction between personal records and those of a collective entity was emphasized, in particular the fact that one who produces the records of a collective entity acts in a purely representative capacity.

Other courts of appeals which have considered the question of the survival of the collective entity rule have reached the same conclusion. *E.g., United States v. Malis,* 737 F.2d 1511, 1512 (9th Cir. 1984), ("It is well established that an individual may not assert the fifth amendment privilege to avoid producing the records of a collective organization where he possesses

such records in a representative capacity," citing *Bellis*); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir.), *cert. denied sub nom. Vargas* v. *United States*, _____ U.S. _____, 105 S. Ct. 90 (1984) (discussing post-*Fisher* applications of the collective entity rule and the significance of the custodian's representative capacity.).

II.

The panel in this case concluded, and the appellants argue here that the decision of the Supreme Court in *United States* v. *Doe*, _____ U.S. _____, 104 S. Ct. 1237 (1984), rendered meaningless the distinction between personal records and those of a collective entity where the act of production is claimed to be incriminating. The appellants contend that *Doe* extended to the custodian of corporate and partnership records the same right to refuse to produce those records as an individual has with respect to personal records. We do not read *Doe* so expansively. The panel also held that the government could enfore the Morganstern subpoenas only if it granted use immunity, again relying on *Doe*. The discussion of immunity in *Doe* came only after the Supreme Court had found that the Fifth Amendment privilege against compulsory self-incrimination applied to the facts of the case because personal records were sought. Immunity is not involved if the person subpoenaed has no Fifth

Amendment right to refuse to comply. We conclude that immunity is not an issue in the present case because the collective entity rule prevents the custodian of corporate and partnership records from relying on the act of production as a testimonial incriminating act.

A.

Justice Powell stated the issue in *Doe* as follows:

> [W]hether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the *business records of a sole proprietorship.*

104 S. Ct. at 1239 (emphasis added). Nowhere in the *Doe* opinion is it even hinted that it announces a departure from the collective entity rule. Rather, the opinion points out "that the court of appeals in *Doe* noted that an individual may not assert the Fifth Amendment privilege on behalf of a corporation, partnership, or other collective entity," citing *Bellis* with apparent approval. *Id.* at 1240 and n. 4. The court of appeals in *Doe* had upheld the privilege, pointing out that even though business records were sought, since *Doe* operated as a sole proprietorship, the business records were "no different from the individual owner's personal records." *Id.* This was the crux of the case. The subpoena sought personal records of the person

subpoenaed. A sole proprietorship, though a business, is not a collective entity. Its records are personal property of the owner. In producing them, the owner acts for himself, not in a representative capacity.

In upholding the claim of privilege in *Doe* the Supreme Court noted that the district court had made an explicit finding that the act of producing the documents would involve testimonial self-incrimination. The court of appeals agreed with this finding and the Supreme Court declined to overturn it. This finding compelled the conclusion that the person subpoenaed was entitled to assert a Fifth Amendment privilege in the light of *Fisher*. *Doe* was an application of *Fisher* to the business records of a sole proprietorship where a grand jury subpoena sought to require the owner of the business to produce the records. There is nothing in the *Doe* decision which supports an inference that the collective entity rule, developed by the Supreme Court over a period of nearly 80 years, was overruled *sub silentio*.

B.

Courts which have faced the issue have continued to recognize the collective entity rule since the appearance of *Doe*. In *Butcher* v. *Bailey*, 753 F.2d 465, 471 n. 9 (6th Cir. 1985), this court referred to the rule and stated, "*Doe, supra* is not to the contrary, as it involved the records of a sole proprietorship." The

Tenth Circuit reached the same conclusion in *In re Grand Jury Proceedings (Vargas),* stating:

> While *Doe* clearly recognizes that the production of personal papers may be a testimonial act protected by the fifth amendment, that case does not involve papers held by one in a representative capacity. *Id.* at _____ - _____, 104 S.Ct. at 1241-42. As the Supreme Court made clear in *Fisher* v. *United States,* 425 U.S. 391, 413 & n. 14, 96 S.Ct. 1569, 1582 & n. 14, 48 L.Ed.2d 39 (1976), even though the production of papers held in a representative capacity may be a testimonial act, such production is not protected by the fifth amendment.

727 F.2d at 946.

It is a truism that the privilege against compulsory self-incrimination is a personal one. No collective entity may claim it. Since collective entities can act only through officers and agents, the effect of permitting custodians of partnership and corporate records to avoid production of such records in reliance on the Fifth Amendment would be to extend the privilege against self-incrimination to the collective entities. The custodian of corporate or partnership records acts only in a representative capacity, not as an individual, and production of the records is not a testimonial act of the custodian. Production of the records communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership.

C.

It is well settled in this circuit that if the government later attempts to implicate the custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress. "Such proof would seek to add testimonial value to the otherwise testimony-free act of production." *In re Grand Jury Empanelled March 8, 1983,* 722 F.2d at 297, quoting *United States* v. *Schlansky,* 709 F.2d at 1083.

The judgment of the district court is affirmed.

JONES, Circuit Judge, joined by MARTIN, Circuit Judge. I respectfully dissent. *Fisher* v. *United States*, 425 U.S. 391 (1976), and *United States* v. *Doe*, 104 S. Ct. 1237 (1984), establish the principle that, without reference to the content or origin of documents sought by a subpoena, the compelled act of producing documents may be testimonial and self-incriminating, and therefore privileged under the Fifth Amendment. In *Doe*, the Supreme Court rejected the Third Circuit's holding that the voluntarily-created business records of a sole proprietorship are privileged because they are the equivalent of "the individual owner's personal records." *See* 104 S. Ct. at 1240-42. The Court reaffirmed that the contents of voluntarily-created business records are not privileged. Nevertheless, the Court held that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." 104 S. Ct. at 1242.

To determine whether the act of producing documents was potentially incriminating, the Court in *Doe* did not consider the content of the documents, whether their creation was voluntary or mandatory, or whether their ownership was private or collective. The Court stated that " '[c]ompliance with the subpoena tacitly concedes the existence of the payers demanded and their possession or control by the taxpayer . . . [and] the taxpayer's belief that the papers are those described in the subpoena.' " *Doe*, 104 S. Ct. at 1242 (quoting *Fisher* v. *United States*, 425 U.S. at

410). The controlling questions under *Doe* are whether the act of producing the documents will concede these facts and, if so, whether any of these concessions is self-incriminating.

The majority objects that such a reading of *Doe* does not take account of the continuing vitality of *Bellis* v. *United States*, 417 U.S. 85 (1974). It is apparent to me that *Doe* does not expressly overrule *Bellis* because its rule supplements the rule of *Bellis*. *Bellis* and its predecessors draw a distinction between personal documents and collective documents when they evaluate the claim that a document's contents are privileged. The broad language of *Bellis* was not written to foreclose an act-of-production privilege for corporate documents. The language in *Bellis* is not precisely limited because no act of production privilege was contemplated at the time. *Fisher* and *Doe* represent a new, additional application of the Fifth Amendment privilege to an event which the law did not previously recognize as being potentially testimonial. *Doe* and *Bellis* operate alongside one another, each governing the application of the Fifth Amendment to its own distinct question.

Furthermore, the majority distorts the rationale of *Doe* by promulgating a rule that the act of producing corporate documents is always free of testimonial implications. *See* p. 8 *supra*. I reject the majority's conclusion that the testimonial aspect of an act of pro-

ducing corporate documents arises only at trial when the government seeks to introduce incriminating evidence concerning the act of production. If the act of producing documents involves compelled self-incrimination of the person holding the documents then the government must either grant use immunity to the custodian of the documents or forego compelling him to produce them. *Doe*, 104 S. Ct. at 1243. If the act of producing the documents does not involve compelled self-incrimination then that act implicates neither *Doe* nor the Fifth Amendment. The issue of whether a particular act of production is testimonial is a question of fact to be determined by the district court at the time the custodian of documents contests a subpoena for their production.

Remand to the district court for consideration of *Doe* is particularly appropriate in the present case. The Morgansterns contend that the government sought the records at issue in this matter in order to establish the Morgansterns' connection with the enterprises whose records were sought. Allegedly the government was unable to prove independently the existence of these documents. The Morgansterns also maintain that their possession of the corporate and partnership documents would support an influence that they controlled the enterprises in question. This inference would be incriminating during grand jury proceedings or at trial on a charge of violating the Racketeer Influenced and Corrupt Organizations Act,

18 U.S.C. § 1961 *et seq.* The Morgansterns should have an opportunity to establish their allegations in district court.

The only basis for limiting the rule of *Doe* to proprietorship records is the bare fact that the Supreme Court has yet to apply the act-of-production privilege in the context of a subpoena for corporate documents. As this Court has previously noted:

> The central issue is no longer the nature of the materials whose production is compelled. Instead, the question is whether their production involves testimonial communication on the part of the person to whom a summons or subpoena is directed.

United States v. *Schlansky*, 709 F.2d 1079, 1082 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1591 (1984). I believe the panel in *Schlansky* correctly understood the implications of the addition of an act of production privilege to the canon of Fifth Amendment doctrine and, therefore, I respectfully dissent.

* * * * * * *

Eastern District of Kentucky
FILED
MAR 19 1984
AT LONDON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

IN RE:

PROCEEDINGS BEFORE GRAND JURY,
SUBPOENA NO. 80-CF-1-LN (11-FM-1000)

—ORDER—

On March 16, 1984 at Lexington, came the United States of America, by Barbara Edelman and Jane E. Graham, Assistant United States Attorneys; and the movants, Shelby C. Kinkead, Jr., David Morganstern and Fred Morganstern, by their attorneys, David R. Irvin and Shelby C. Kinkead, Jr., for hearing on Motion of said movants to Quash Grand Jury Subpoena issued for the appearance of Shelby C. Kinkead, Jr., on March 20, 1984 before a Grand Jury sitting at London.

The Court having heard counsel and being sufficiently advised,

IT IS NOW THEREFORE ORDERED,

1. That the aforesaid Motion to Quash Grand Jury Subpoena issued for Shelby C. Kinkead, Jr., be and the same is hereby DENIED.

2. That the oral Motion of the movants to stay the grand jury proceedings, be and it is hereby DENIED.

3. That the documents offered by the movants in support of their motion to quash be and the same are hereby filed and made a part of the record herein.

4. That the Court reserves the right to preclude the introduction of the act of production.

IT IS FURTHER ORDERED, that pursuant to the recommendation of the Judicial Conference of the United States at its meeting of March 12 and 13, 1981 and September 24 and 25, 1981, this Order and the documents filed this date shall be sealed, provided, however, that the Clerk shall furnish one copy of this Order to counsel.

This 19 day of March, 1984.

/s/ Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

Copies to
U. S. Attorney
Shelby C. Kinkead, Jr.
David R. Irvin

A True Copy Attest
Leslie G. Whitmer, Clerk
U.S. District Court
By /s/ Shirley Allen D.C.

* * * * * * *

(2)

No. 85-658

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID MORGANSTERN AND FRED MORGANSTERN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they may resist a subpoena for corporate and partnership documents on the ground that the act of producing the documents would incriminate them.

1. On January 11, 1984, attorney Shelby C. Kinkead, Jr. was served with a grand jury subpoena requiring him to produce the records of partnerships and corporations controlled by petitioners. Petitioners unsuccessfully moved to quash the subpoena on Fifth Amendment and other grounds. A panel of the Sixth Circuit reversed, holding that the act of producing the subpoenaed documents was protected by the Fifth Amendment privilege because it would involve a risk to petitioners of substantial testimonial self-incrimination from which they had not been immunized.

Thereafter, the court of appeals, sitting en banc, vacated the panel decision and affirmed the judgment of the district court (Pet. App. 1a-16a).

In affirming the denial of the motion to quash, the en banc court of appeals relied on a long line of decisions of this Court, including *Bellis* v. *United States*, 417 U.S. 85 (1974), that holds that the books and records of a collective entity such as a partnership or corporation cannot be insulated by a claim of personal privilege on the part of their custodian (Pet. App. 3a-6a). The court rejected the argument that *United States* v. *Doe*, 465 U.S. 605 (1984), "extended to the custodian of corporate and partnership records the same right to refuse to produce those records as an individual has with respect to personal records" (Pet. App. 8a). The court explained that, although *Doe* recognized that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment (*id.* at 9a-10a), it did not involve a subpoena for corporate or partnership records and therefore did not "support[ ] an inference that the collective entity rule, developed by [this] Court over a period of nearly 80 years, was overruled *sub silentio*" (*id.* at 10a).

2. Petitioners contend that the subpoenas at issue here should be quashed because the act of producing the requested documents would incriminate them. This Court has repeatedly held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957). See also, *e.g.*, *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Bellis* v. *United States*, 417 U.S. at 88; *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911). Nothing in

Doe purports to overrule these cases. Following *Doe,* however, the circuits have rendered inconsistent opinions regarding this question. Several circuits, including the court of appeals in this case, have reaffirmed the traditional rule. *In re Grand Jury Subpoena (Lincoln),* 767 F.2d 1130 (5th Cir. 1985); *United States* v. *Malis,* 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas),* 727 F.2d 941 (10th Cir. 1984), cert. denied, No. 83-1756 (Oct. 1, 1984). The Third Circuit has held that a corporate custodian may insist upon receiving act-of-production immunity. *In re Grand Jury Empanelled 3-23-1983 (Katz),* No. 85-5018 (Sept. 23, 1985); *In re Grand Jury Matter (Brown),* 768 F.2d 525 (1985) (en banc). The Second Circuit has held that the Fifth Amendment provides no ground for resisting a subpoena for corporate documents if the corporation is permitted to choose the agent who makes production. *In re Two Grand Jury Subpoenae Duces Tecum,* 769 F.2d 52 (1985). This allows the corporation to find an officer or employee or to appoint an outside agent willing to produce the documents without claiming the Fifth Amendment privilege.

While the decisions of the courts of appeals exhibit considerable disagreement regarding the governing legal rules in this area, it is not clear that any circuit would reach a result different from that of the Sixth Circuit in the present case. Here, the subpoena was not directed to a corporate officer but to an attorney who apparently handled the corporations' legal affairs. The attorney did not claim that the act of production would incriminate him personally. Thus, the attorney was apparently just the sort of agent that the corporation would be required to find to make production under the Second Circuit approach. And the Third Circuit has indicated that it might find that approach acceptable. See *Rogers Transportation, Inc.* v. *Stern,* 763 F.2d 165 (1985).

In any event, even if there were a true conflict, there would be no occasion to resolve it here because, following the denial of petitioners' request for a stay pending appeal,[1] petitioners' attorney turned all the subpoenaed documents over to the government. Accordingly, petitioners' motion to quash the subpoena is moot. If petitioners are indicted and the government seeks to use their attorney's act of producing the subpoenaed documents against them, petitioners may move to suppress that evidence. If the district court denies the suppression motion, petitioners are convicted, and the court of appeals upholds their convictions, they may seek review by this Court of the question posed by their present petition. At the present time, however, the issue of whether the act of producing the subpoenaed documents may properly be used against petitioners is not yet ripe for review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

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[1]We argued in the court of appeals that the case was moot (see U.S. Supp. Br. 4-5), but the court of appeals did not rule on the issue of mootness, and petitioners have not raised that issue in this Court.

DOJ-1985-11